

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff,

v.

Case No. 04-C-0477-C

ABBOTT LABORATORIES, ET AL.,

Defendants.

**PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTION TO STAY
ALL PROCEEDINGS PENDING TRANSFER BY THE JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION**

It is a misuse of the Multidistrict Litigation Panel ("MDL") procedures to file a baseless Notice of Removal and then seek to utilize the MDL procedures to transfer a case to a foreign jurisdiction for no identifiable purpose other than to delay the litigation for many months while the case is shipped back and forth. Yet this is precisely what defendants have done here.

Plaintiff, State of Wisconsin, filed this lawsuit in state court (the Circuit Court of Dane County), alleging, among other things, that defendants had defrauded Wisconsin's Medicaid and SeniorCare programs by publishing phony, inflated wholesale prices for their drugs which resulted in huge overcharges to the State. Wisconsin also sought to enjoin defendants' conduct, and as part of its enforcement duties, to recover for those residents and former residents who were also victimized by defendants' fraud. Defendants removed the Complaint on the basis of diversity alone, arguing that this Court was required to ignore the fact that the State was the only plaintiff (a state may not be removed on the grounds of diversity) and instead look to the

citizenship of the State's residents (which they erroneously argued are diverse from defendants) because Wisconsin is also seeking relief for its citizens. (This is a new theory just developed by the defendants. The few related state actions which have been successfully removed—most have not been—were removed on the basis of federal question jurisdiction which concededly is not present here.) Wisconsin has now filed a Motion To Remand the Complaint to state court on multiple grounds including that no case supports defendants' attempt to strip Wisconsin of its sovereign right to choose a state forum, that defendants' argument is so weak that it has never been raised by them in any other average wholesale price ("AWP") case (*see* page 8, n.4 of defendants' memorandum in support of stay request conceding as much), and that there is a lack of diversity in any event.

In the ordinary course, this Court would promptly decide plaintiff's motion and send this case back to state court where it belongs, but defendants have now filed a motion asking that the Court stay its hand and, instead, ship the Complaint off to a huge MDL proceeding in Massachusetts where plaintiff's remand motion will not be decided for many months. This attempt to delay a prompt decision on Plaintiff's Motion To Remand should be rejected for all the following reasons:

I. BECAUSE DEFENDANTS' REMOVAL IS OBVIOUSLY IMPROPER, PLAINTIFF'S REMAND MOTION SHOULD BE PROMPTLY DECIDED.

See Plaintiff's Motion To Remand, where we show that: (1) the case law categorically rejects defendants' diversity theory and, (2) that so weak is defendants' basis for removal that they have not even bothered to assert it in any other of their many removal petitions. It is unfair to embroil a plaintiff in an MDL proceeding where the removal petition is baseless, as here. Judge Adelman ruled just this in *Meyers v. Bayer AG*, 143 F. Supp. 2d 1044, 1049

(E.D. Wis. 2001). Because of the primacy of jurisdiction, the fact that 28 U.S.C. § 1447(c) suggests that cases should be remanded when it becomes clear that jurisdiction does not exist, the fact that it makes no sense spinning the judicial wheels to send a case to the MDL court that clearly does not belong there, and the fact that it is a hardship for plaintiff's counsel to argue their case in a foreign jurisdiction, Judge Adelman concluded that "a court should first give preliminary scrutiny to the merits of the motion to remand. If this preliminary assessment suggests that removal was improper, the court should promptly complete its consideration and remand the case to state court." *Myers*, 143 F. Supp. 2d at 1049. Judge Adelman's analysis makes obvious sense and it has instant appeal in this case where the defendants' basis for removal is so patently thin that it should lead to a prompt remand.

II. THIS COURT IS THE COURT BEST EQUIPPED TO DECIDE THE JURISDICTIONAL ISSUE.

While it is certainly true that the transferee court can decide the Motion to Remand as defendants suggest, there is no good reason for having it do so in the context presented here. This Court is far more familiar with the law in this circuit in connection with jurisdictional issues than is a district court in Massachusetts. And there is no good reason for ceding the determination of the adequacy of defendants' jurisdictional basis to another district court in another circuit. This district, and this circuit, should make its own determination on important jurisdictional issues surfacing in litigation filed here.

III. A DECISION BY THIS COURT ON PLAINTIFF'S MOTION TO REMAND WILL SAVE THE PARTIES AN ENORMOUS AMOUNT OF TIME, WHATEVER THE OUTCOME.

If this Court decides that remand is the only appropriate course, then this case will promptly be returned to state court and that will be the end of the removal

proceedings.¹ Alternatively, if this Court were to rule in favor of defendants, the parties could begin to work out how this case will fit in with the other MDL cases immediately.

If Defendants' Motion to Stay is granted the result is far different. By the time litigation over whether the case actually belongs in Massachusetts concludes, and the file is transferred (if that is the result), many months will pass. And by the time the remand motion makes its way through the thicket of motions now pending before Judge Saris in Massachusetts, more months will have passed. Assuming that Judge Saris remands the case, as plaintiff is confident she will do, perhaps a full year will have passed without one useful thing happening in this litigation. "[W]hen a party takes affirmative action following removal that advances the litigation in the district court, that party may waive its right to object to procedural irregularities in the removal proceedings." *Barcena v. State of Illinois, Department of Insurance*, No. 92-C-2568, 1992 WL 186068, at *2 (N.D.Ill. July 27, 1992). This result would be a disservice to the plaintiff, and to the circuit court judge in Dane County who is undoubtedly interested in moving cases on her docket along—particularly sizable cases that will take time to resolve no matter what happens.

The same analysis applies even if Judge Saris were to deny remand since in the months leading up to her remand decision plaintiff will be in limbo, unable to participate in the MDL litigation in any meaningful way. This result is equally not helpful to Judge Saris.

This case is wholly unlike the case of *Weinke v. Microsoft Corp.*, 84 F. Supp. 2d 989 (E.D. Wis. 2000) where there pended 18 similar remand motions spread across the country. There it was inefficient to decide each motion individually. Here the opposite is true. This is the only case removed on the basis of diversity. It would be incredibly inefficient to

¹A remand for lack of jurisdiction is not appealable. 28 U.S.C. 1447(c) and (d).

tie resolution of this motion up with all the other issues surrounding the MDL litigation, particularly where defendants' legal basis for removal is so thin.

IV. NO SIMILAR REMAND PETITIONS HAVE BEEN OR ARE BEING CONSIDERED BY THE MDL JUDGE, HENCE NO EFFICIENCIES WILL RESULT FROM TRANSFERRING THE CASE.

No case raising the jurisdictional issues defendants assert in this case are pending at the MDL. Although defendants cite a large number of cases that have been successfully removed, most of these cases are class actions, not cases brought by states pursuant to their law enforcement duties. The few state cases which have been successfully removed have raised federal questions. No such questions are presented here, and defendants do not argue otherwise. Those state cases which do not raise federal questions have either been remanded (*see* the decision of Judge Saris attached as Exhibit B to Plaintiff State of Wisconsin's Motion To Remand) or not been the subject of a removal notice. Thus, AWP litigation is ongoing in the state courts of Kentucky, Texas, Pennsylvania, Florida, New York, Ohio, West Virginia and Minnesota (after Judge Saris remanded the case). No complaint brought by a state has been successfully removed on diversity grounds.

In a factual context such as this one where there are no other similar remand petitions pending at the MDL, no economies of scale are realized by sending the case for resolution to the MDL court. As Judge Adelman stated: "The only reason to permit the transferee court to decide the jurisdictional issue would be to further judicial economy and consistency. H.R.Rep. No. 90-1190. If the jurisdictional issue in the particular case is different from those in the other cases subject or potentially subject to MDL jurisdiction, these values do not come into play." *Meyers*, 143 F. Supp. 2d at 1049. Thus, Judge Adelman concluded that transferring a

case to the MDL before deciding a plaintiff's remand motion made sense only when the "the jurisdictional issue is both difficult and similar or identical to those in cases transferred or likely to be transferred." Here the remand issue is neither difficult nor likely to be repetitive since no other case currently raises the issue at the MDL and no other removal petition is pending. (Nor, we believe, is the issue likely to be raised again after a decision is made in this case, so baseless is defendants' removal.)

V. THERE IS NO PRACTICAL REASON TO LINK THIS CASE WITH THE MAIN MDL LITIGATION.

The core complaint in the MDL asserts no claims on behalf of the State of Wisconsin and only a federal RICO claim on behalf of Wisconsin residents (no class has been certified). Thus, there is little to be gained from linking this case with the MDL proceeding.

In sum, the primary justification for a stay, as asserted in defendants' memorandum, is efficiency and judicial economy. But granting defendants' motion in this instance will lead to precisely the opposite result—it will impose months of delay on this case for no legitimate reason. As a consequence, plaintiff respectfully requests that this Court reject defendants' request that it decline to decide Plaintiff's Motion to Remand.

VI. DENYING THE MOTION TO STAY COMPORTS WITH THE STATE'S SOVEREIGN IMMUNITY.

The foundation for the State of Wisconsin's Motion for Remand is that as a sovereign it shall not be subjected to the jurisdiction of the federal courts except upon such circumstances as clearly defined by the United State's Supreme Court. As more fully discussed in the State's previously filed brief, the Eleventh Amendment does not exist "solely in order to 'preven[t] federal-court judgments that must be paid out of a State's treasury[;]'" rather, the Eleventh

Amendment “serves to avoid ‘the indignity of subjecting a State [including the State of Wisconsin] to the coercive process of judicial tribunals at the instance of private parties.’” *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996) (quoting from *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994), and *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy*, 506 U.S. 139, 146 (1993)). With no disrespect intended toward this Court, granting the Defendants’ Motion to Stay perpetuates that indignity. An expeditious resolution to the jurisdictional issue by this Court protects the State’s sovereignty.

CONCLUSION

Plaintiff State of Wisconsin respectfully asks this Court to deny Defendants’ Motion to Stay All Proceedings.

Dated this 5 day of August, 2004.



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